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In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. 398 MISC.

JOHN T. MILLER,
Libelant,

vs.

STANDARD OIL COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Seventh Circuit, and
BRIEF IN SUPPORT THEREOF.

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In the Supreme Court of the United States

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OCTOBER TERM, 1952.

JOHN T. MILLER,

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vs.

STANDARD OIL COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Seventh Circuit.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioner, John T. Miller, libelant, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit rendered November 5, 1952 affirming a final decree in admiralty of the District Court for the Northern District of Illinois, Eastern Division filed on May 9, 1952 in favor of respondent. That decree dismissed the libelant's case on its merits with prejudice.

JURISDICTION.

Jurisdiction is based on 28 U. S. Code Sec. 1254 (1).

The judgment below was entered November 5, 1952, and the petition for hearing was denied on November 25, 1952.

The case involves an interpretation of the Great Lakes Statute 28 U. S. C. A. Sec. 770; Sec. 28 U. S. C. 1873, June 25, 1948.

SUMMARY STATEMENT.

The libelant was employed as a seaman by the respondent on the Steamer Robert W. Stewart and while so employed on December 21, 1944 he sustained an injury to his knees and back while in the course of his employment as a seaman and under articles as an ordinary seaman.

Paragraph 3 of the libelant-appellant's suit in admiralty alleged that the respondent did own and operate the Steamer Robert W. Stewart, being a vessel of the United States of more than 20 tons burden, enrolled and licensed for the coasting trade and was employed and engaged in the business of commerce and navigation between places in different states and upon the Great Lakes and their connecting and tributary waters, and this allegation was in substance admitted by the respondent in paragraph 3 of their Answer.

A demand for a jury trial was made by the libelant and the respondent made exception to this demand and on January 22, 1952 the Honorable J. S. Perry entered an order sustaining the respondent's exception, thus denying the libelant-appellant a trial by jury.

The suit was tried without a jury, and testimony of the respondent's witnesses disclosed that the injury occurred as alleged by the libelant.

THE DECISIONS BELOW.

The District Court held that the libelant was not entitled to a trial by jury. The District Court further held that the libelant sustained an injury to his knees as alleged but that said injury was not disabling and therefore he was not entitled to any maintenance and cure. It entered a decree in favor of respondent, dismissing the libel on its merits with prejudice.

The Court of Appeals for the Seventh Circuit ruled that the findings of fact made by the admiralty court were supported by substantial evidence. This Court took cognizance of the Act of June 5, 1948 Section 1873 entitled Judicial Code and Judiciary, which reads as follows:

> "In any case of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons or upward, enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between places in different states upon the lakes and navigable waters connecting said lakes, the trial of all issues of fact shall be by jury if either party demands it."

Reading from page 4 of the United States Court of Appeals' Opinion the court said:

> "It will be noted that the portion of the act now retained in our Federal Statutes relates (a) to matters of contract and tort; (b) arising upon or concerning a vessel of 20 tons burden or upwards; (c) which vessel is enrolled and licensed for the coasting trade; and (d) employed in commerce and navigation between places in different states and upon the lakes and navigable waters connecting such lakes.
>
> The libel in the proceeding under consideration specifically charged the existence of the elements (b) (c) and (d), that is to say: it charged that the ship

'Robert W. Stewart' was of 20 tons burden or upwards; that it was enrolled and licensed for the coasting trade; that it was engaged in commerce and navigation between places in different states on the lakes and their tributaries. We find these elements are established in the record.

But as to the element we have marked (a) the only allegation in the libel is an allegation that the proceeding is for 'maintenance and cure, a cause of action, civil and maritime.'

"We are therefore confronted with the question: Is a proceeding by a seaman against his shipowner for maintenance and cure, a matter of contract and tort within the meaning of Section 1873 of the Judicial Code of the United States of 1948."

The court held that a suit for maintenance and cure is not a contract action and therefore a seaman is not entitled as a matter of right to demand a jury trial in a case seeking maintenance and cure. Accordingly it affirmed the judgment of the District Court.

STATUTES INVOLVED.

(1) The Act of February 20, 1845, 5 Stat. at L. 726 (1845).

(2) Judiciary Act of 1789, 28 U. S. Code 41 (3).

(3) Great Lakes Statute, 28 U. S. C. A. Sec. 770; Sec. 28 U. S. C. 1873, June 25, 1948, C. 646, 62 Stat. 953.

QUESTION PRESENTED.

Whether or not a suit in admiralty for maintenance and cure is a matter of contract or tort to be tried by jury when either party requires it as provided by the Great Lakes Statute, 28 U. S. C. A. Sec. 770; Sec. 28 U. S. C. 1873, June 25, 1948.

ASSIGNMENT OF ERRORS.

The libelant, John T. Miller, hereby assigns error in the proceedings, decrees, orders and decisions of the District Court and the Court of Appeals in the above-entitled action as follows:

First: The District Court and the Court of Appeals erred in failing to grant libelant a trial by jury.

Second: The District Court and the Court of Appeals erred in holding that the libelant was not even entitled to a dav's maintenance and cure after they had found that the libelant had sustained an injury, although he must be afforded some maintenance and cure if injured in the service of the ship.

Third: The Court of Appeals erred in holding that maintenance and cure is not a matter of contract or tort.

Fourth: The Court of Appeals erred in holding that the Great Lakes Statute, 28 U. S. C. A. Sec. 770; Sec. 28 U. S. C. 1873, June 25, 1948, C. 646, 62 Stat. 953 was not applicable to the present case after the Court of Appeals had expressly found that all elements necessary to bring the case under the statute were present except they went on to hold that this maintenance and cure action was not one of contract or tort.

Fifth: The Court of Appeals erred in affirming the District Court's finding that the allegations of the libelant had not been proved.

Sixth: The Court of Appeals erred in affirming the decree of the District Court dismissing the libel and entering a judgment in favor of the respondent and taxing the costs against the libelant in favor of the respondent.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The decision below is in direct conflict with the decisions of this Court as to the meaning and effect of an action for maintenance and cure.

The Iroquois, 194 U. S. 240;

Pacific Steamship Company v. Peterson, 278 U. S. 130;

Cortes, Administrator v. Baltimore Insular Line, Inc., 287 U. S. 367;

Calmar Steamship Corp. v. Taylor, 303 U. S. 525.

2. That the decision below is in direct conflict with the decision of the Sixth Circuit on the same point.

Runyon v. Great Lakes Dredge & Dock Co., 141 Fed. Reporter 396.

3. The decision below is in direct conflict with the decision of the Ninth Circuit.

The City of Avalon, 156 Fed. 2d 500.

4. The decision below is in direct conflict with decisions on this point in the various District Courts.

Vincent v. Ann Arbor R. Co., District Court, S. D. New York, 73 Fed. Supp. 729;

Sperbeck v. A. L. Burbank & Co. Inc., U. S. District Court, S. D. New York, 88 Fed. 623;

Burkholder v. U. S., District Court, Pa. 1945, 60 F. Supp. 700, 186 F. 2d 1015;

McDonald v. Cape Cod Traveling Corp. et al., District Court Massachusetts, 71 Fed. Supp. 888.

5. The question presented is one of general public importance and the decision below constitutes a plain misapprehension of the purpose and effect of the Great Lakes Statute.

Wherefore petitioner respectfully prays that a Writ of Certiorari issue out of and under the seal of this Honorable Court directed to the Court of Appeals for the Seventh Circuit commanding that court to certify and send to this Court for its review and determination a full and complete transcript of the record below and that the decision of said Court of Appeals be reversed and that petitioner have such other and further relief as may be just.

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No. . . . . .

JOHN T. MILLER,
Libelant,

vs.

STANDARD OIL COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION.

POINT I.

The decision below is in direct conflict with the decisions of this Court as to the meaning and effect of an action for maintenance and cure.

In the case of the *Pacific Steamship Company v. Peterson,* 278 U. S. 130, this Court stated that

> "The right to maintenance, cure and wages under the old admiralty rule is a contractual right, cumulative to and not inconsistent with, or an alternative of, the new right to recover compensatory damages for injuries caused by negligence."

In *Harden v. Gordon,* 2 Mason 541, 11 Fed. Cas. 480, 481—cited with apparent approval in the *Osceola* case, 189 U. S. 158—Mr. Justice Story said that a claim for the expenses of curing a seaman in case of sickness "constitutes, in contemplation of law, a part of the compensation for the labour and services of the seamen."

In *Cortes, Administrator v. Baltimore Insular Line, Inc.,* 287 U. S. 367, Mr. Justice Cardozo said the duty to

provide maintenance and cure is contractual in the sense that it has a source in a relation which is contractual in origin. The court further stated in that case:

> "If the failure to give maintenance or cure has caused or aggravated an illness, the seaman has his right of action for the injury thus done to him, the recovery in such circumstances including not only necessary expenses, but also compensation for the hurt."
>
> "We think the origin of the duty is consistent with a remedy in tort, since the wrong, if a violation of a contract, is also something more. The duty, as already pointed out, is one annexed by law to a relation, and annexed as an inseparable incident without heed to any expression of the will of the contracting parties. For breach of a duty thus imposed, the remedy upon the contract does not exclude an alternative remedy built upon the tort."
>
> "Given a relation involving in its existence a duty of care irrespective of a contract, a tort may result as well from acts of omission as of commission in the fulfillment of the duty thus recognized by law."
>
> "The master's authority is quite despotic and sometimes roughly exercised, and the conveniences of a ship out upon the ocean are necessarily narrow and limited. Out of this relation of dependence and submission there emerges for the stronger party a corresponding standard or obligation of fostering protection."

In the case of *Calmar Steamship Corp. v. Taylor,* 303 U. S. 525, Justice Stone citing the *Osceola* case and the *Cortes vs. Baltimore Insular Line* case, *supra,* stated the duty to provide maintenance and cure arises from the contract of employment.

Mr. Justice Story in *Harden vs. Gordon, supra* stated:

> "the protection of seamen, who, as a class, are poor, friendless and improvident, from the hazards of ill-

ness and abandonment while ill in foreign ports; the inducement to masters and owners to protect the safety and health of seamen while in service; the maintenance of a merchant marine for the commercial service and maritime defense of the nation by inducing men to accept employment in an arduous and perilous service."

Thus a cause of action for maintenance and cure would have to be one based either on contract or tort and if so a seaman is entitled to a trial by jury under the Great Lakes Statute. A right of trial by jury is a right to be protected with jealousy, and in the present case where the Court of Appeals has found that all facts necessary to place this case under the protection of the Great Lakes Statute were shown the libelant should not be denied this right as a result of an erroneous conclusion that maintenance and cure is not a matter of contract or tort.

POINT II.

The decision below is in direct conflict with the decision of the Sixth Circuit on the same point.

"It is settled that the right to maintenance, cure and wages of a seaman is a contractual obligation arising out of the nature of the employment." *Runyon v. Great Lakes Dredge & Dock Co.*, 141 Fed. Reporter 396.

POINT III.

The decision below is in direct conflict with the decision of the Ninth Circuit.

"The purpose of the historic implied contract to maintain an injured seaman arises from his helplessness during his injury, a right every court should watch with jealousy to maintain." *The City of Avalon*, 156 Fed. 2d 500.

POINT IV.

The decision below is in direct conflict with decisions on this point in the various District Courts.

> "Recovery for maintenance and cure by seaman who becomes sick in service of vessel arises out of contract of employment and is not predicated on negligence." *Vincent v. Ann Arbor Co.*, District Court, S. D. New York, 73 Fed. Supp. 729.
>
> "Right of injured seaman was contractual and did not abate upon death of seaman." *Sperbeck v. A. L. Burbank & Co. Inc.*, U. S. District Court, S. D. New York, 88 Fed. 623. In this case the court cited the *Cortes* case 287 U. S. 367 as authority and explained that when Justice Cardozo said that under maritime law the remedy ends with the seaman's death, Justice Cardozo was speaking of the tort of failing to give maintenance and cure which caused or aggravated an illness.
>
> "A seaman's right to maintenance and cure and wages is a contractual right independent of right to recover indefinitely under the general maritime law." *Burkholder v. U. S.*, District Court Pa. 1945, 60 F. Supp. 700, 186 F. 2d 1015.
>
> "The cause of action for maintenance and cure is founded on a maritime quasi contract." *McDonald v. Cape Cod Traveling Corp. et al.*, District Court Massachusetts, 71 Fed. Supp. 888.

POINT V.

The question presented is one of general public importance and the decision below constitutes a plain misapprehension of the purpose and effect of the Great Lakes Statute.

ARGUMENT.

A review of the early law that formed a basis for the Great Lakes Statute will aid one in determining the meaning and effect of said statute.

The Act of February 20, 1845, 5 Stat. at L. 726 (1845), was the result of the development of commerce upon the Great Lakes, especially after the introduction of Steamboats, as it was thought desirable that the same law should be applied there, as had always been applied on the high seas and tidal waters connected therewith. It was an Act extending the jurisdiction of the District Court to certain cases upon the lakes and navigable waters connecting the same. This Act expressly conferred upon the District Courts admiralty jurisdiction on the Great Lakes in matters affecting enrolled or licensed vessels, of at least 20 tons burden, engaged in commerce between different states and territories as upon the high seas or tidal waters.

The Great Lakes, and the navigable waters connecting them, were declared to be within the constitutional scope of admiralty and maritime jurisdiction. *The Genesee Chief* (1851), 53 U. S. (12 How.) 443, 13 L. ed. 1058.

This Act of 1845 as the title implies, was plainly an act professing to extend the jurisdiction and the provisions saving the right of trial by jury of facts put in issue where either party should require it and it was included because of reverence for the jury system.

The practice of injecting jury trials into Admiralty proceedings on the Great Lakes and waters connected therewith, was carried into Section 566 of the revised statutes.

As the Great Lakes are navigable, District Courts also have jurisdiction under the terms of the Judiciary Act of 1789, 28 U. S. Code 41 (3). Therefore, the Act of 1845, which was passed for the purpose of extending the ad-

miralty jurisdiction, was accordingly inoperative as a grant of jurisdiction and also inoperative as a restriction upon it because not so intended.

The leading case on the subject is the *Western States* (1908), 159 F. 354, 357 (C. C. A. 2d). This case discusses all the early statutes and cases, including the Rev. St. 566 (U. S. Comp. St. 1901, p. 4611). This statute provided that in cases of admiralty and maritime jurisdiction relating to any matter of contract or tort arising on or concerning any vessel of 20 tons burden or upward, enrolled and licensed for the coasting trade and at the time employed in the business of commerce and navigation between places in different states and territories upon the Great Lakes and navigable waters connecting the Lakes, the issues of fact shall be tried by jury when either party requires it. The Court further held that the verdicts rendered under Section 566 were not merely advisory.

The case of *Boyd v. Clark*, 13 Fed. 908, often confused as holding that the verdict under Section 566 was advisory only, never really decided this point but only held that the proper practice in such cases was to take on appeal, and not a writ of error, and as to the effect of the verdict, Mr. Justice Matthews declined to express an opinion.

In the *Genesee Chief*, 12 How. 443, 13 L. Ed. 1058, the court treated the provision for a jury trial as a regulation of practice, and it was not necessary to be decided, because the learned judge found the vessel did not fall within the provisions of Section 566.

The Act has been repealed but its provision securing to either party in admiralty cases the right to jury trial if he thinks proper to demand it, has been preserved, 28 U. S. Code 770; *Sellon, Admx. v. Great Lakes Tr. Co. (The H. A. Scandrett)*, 1937 A. M. C. 326, 87 F. (2d) 708 (C. C. A. 2d).

A libelant is entitled to a jury trial under 28 U. S. C. A., Sec. 770, if his pleadings show that the vessel on which it is claimed his injury was sustained, was 20 tons burden or upward, enrolled and licensed for the coasting trade, or that it was at the time employed in the business of commerce and navigation between places in different states and territories upon the lakes and navigable waters connecting the lakes, *Strusa v. Minnesota Atlantic Transit Co. et al.*, 13 Fed. Supp., page 872.

28 U. S. C. A. 1873 provides:

> "in any case of admiralty or maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel by twenty tons or upward, enrolled and licensed for the coasting trade and employed in the business of commerce and navigation between places in different states upon the lakes and navigable waters connecting said lakes, the trial of all issues of fact shall be by jury if either party demands it. June 25, 1948, C. 646, 62 Stat. 953."

Therefore, the law above cited clearly indicates that the libelant was entitled to a trial by jury and therefore the decree, insofar as it was based on a trial without a jury was erroneous.

POINT VI.

The petitioner respectfully submits that maintenance and cure if not a contract must be a tort, it has to be one or the other, and as such is covered by the Great Lakes Statute above mentioned. Assuming for the purposes of this petition that the District Court and the Court of Appeals decision was correct in all respects save this one, the case should be remanded to the District Court for a trial by jury.

LAST POINT.

It is respectfully submitted that a writ of certiorari should be granted, and that the decisions of the District Court and the Court of Appeals should be reversed.

Respectfully submitted,

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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SUMMARY OF ARGUMENT.

The decision below is not in conflict with any other decision. Reasons relied on by Petitioner for allowance of the Writ discussed Point by Point and shown to be incorrect..... 3-6

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, Standard Oil Company, requests that the Petition for Certiorari be denied and presents this brief in opposition to said petition.

STATEMENT.

The action in the United States District Court was filed in admiralty asking an award under the doctrine of maintenance and cure, anciently developed by the admiralty courts out of the relationship of the seaman to his ship. No wrongful act was alleged; none is necessary to an award for maintenance and cure as such awards are not based on negligence, and rights of a seaman in any given case exist regardless of any meeting of the minds.

This is the case of a seaman who in 1944 slipped and skinned his shin, which was cured in less than three weeks, who lost no time from work and sustained no medical expense. His libel for alleged maintenance and cure was fully heard in open court on oral testimony and was dismissed as being without merit. The District Court stated at the conclusion of the testimony that it is the kind of a case that "should not be brought." On the appeal the

record was before the Court of Appeals, which hears admiralty cases *de novo* and that court found that the findings of the District Court were supported by substantial evidence.

Petitioner contends in his assignment of errors that the two lower courts erred in failing to grant the petitioner a trial by jury, to which he claims the right under the Act of February 20, 1845, 5 Stat. at L. 726, now codified in 28 U.S.C.A. 1873. He also claims that these courts erred in finding that the allegations of the libel had not been proved. The statute which is involved applies only on the Great Lakes, and then only in certain limited types of cases as specified in the Act itself. We submit that the case at bar does not fall within the statute, that the Court of Appeals correctly interpreted the law and that there is no merit in the Petition for Certiorari.

Reasons Relied on For the Allowance of the Writ are set forth on page 6 of the Petition in five numbered paragraphs. All five of these statements are false as is apparent from even the most casual examination of the authorities cited in support thereof. None of the cases cited therein by Petitioner deal with or even cite the Great Lakes jury trial statute on which the Petitioner relies in the case at bar. Paragraphs 2, 3 and 4 of the Reasons state that the decision below is in direct conflict with decisions of the Sixth and Ninth Circuits and various District Courts. That is manifestly untrue.

As to the Petitioner's assertion in Reason 5 that the question presented is one of general public importance, we restrain ourselves in saying simply that this attempt to take from the admiralty court one of its most ancient and logical prerogatives is of no interest or importance generally but interests only the Petitioner herein and possibly some few proctors whose cases are similarly without merit wherein another "bite" on the shipowner might force a settlement to avoid expense of jury trial.

ARGUMENT.

Reference will here be made to the Brief in Support of Petition, point by point in the order therein used.

Point I.

It is claimed that the decision below is in direct conflict with the decisions of this court as to the meaning and effect of an action for maintenance and cure. Cited to this point is *Pacific S.S. Co.* v. *Peterson,* 278 U.S. 130, which was an action at law in a state court for damages under the Jones Act, the court holding that previous receipt of maintenance and cure did not in law constitute an election which would prevent recovery of damages. This case is entirely consistent with the decision below in the case at bar, this Court pointing out, p. 138, that the right to maintenance and cure is implied in law.

Harden v. *Gordon,* 11 Fed. Cas. 480, No. 6047 referred to the law of maintenance and cure for seamen as "the parental law, which relieves them in sickness by fastening their interests to the ship." (p. 483).

Cortes v. *Baltimore Insular Line,* 287 U.S. 367 was a suit for damages based on failure to provide proper medical care. It was not a suit for maintenance and cure as such but for damages based on a breach of the duty imposed by law, in which Justice Cardozo's opinion clearly stated the nature of maintenance and cure as follows:

> "The duty, as already pointed out, is one annexed by law to a relation, and annexed as an inseparable incident without heed to any expression of the will of the contracting parties." (287 U.S. at 372; 53 S. Ct. at 174)

> "Given a relation involving in its existence a duty of care irrespective of a contract, a tort may result as well from acts of omission as of commission in the fulfillment of the duty thus recognized by law." (287 U.S. at 374; 53 S. Ct. at 175)

Calmar S.S. Corp. v. *Taylor,* 303 U.S. 525, next cited by petitioner likewise demonstrated that the obligation to provide maintenance and cure arises out of public policy (p. 530). That seamen are wards of the admiralty court as to maintenance and cure is conceded by petitioner. In an admiralty case such as this, an award of maintenance and cure rests in the sound discretion of the admiralty court as to the seaman, its ward. To give such determination to a jury would amount to making the seaman the ward of twelve jurors not versed nor skilled in such matters and would breach the relationship between the admiralty court as fiduciary or trustee and the seaman as its ward.

None of the cases cited by petitioner under Point I support the proposition contended for, and although they do not involve the statute now before this Court, the language of the opinions in all of the cited cases is consistent with and in fact supports the decision of the Court of Appeals below.

Point II.

Petitioner cites *Runyan* v. *Great Lakes Dredge & Dock Company,* 141 F. 2d. 396 as being in direct conflict with the decision below. That cited case was in admiralty *without jury trial* and the only question was whether the damages alleged had been included in a prior suit.

Point III.

Conflict with the Ninth Circuit is asserted in the Petition, citing *The City of Avalon,* 156 F. 2d 500. That was

a libel in admiralty (without jury) against a fishing boat and its owner to recover for food (maintenance) after an injury and for a share in the catch. Libelant had recovered damages in a separate suit which did not embrace maintenance and cure. Hence there was no estoppel. The opinion points out that courts should watch with jealousy "the historic implied contract to maintain an injured seaman * * *"

Point IV.

Here the petition asserts that the decision below is in direct conflict with decisions on this point in the various District Courts. That simply is not so. The cases cited do not pertain to the Great Lakes jury trial statute in any respect. They refer to maintenance and cure in general terms as arising out of the contract, or as being quasi contractual or annexed to the employment in distinguishing the right to an award from an action for damages under the Jones Act. This is not even *dicta* in support of Petitioner. What is a "matter of contract" under the statute with which we are concerned is a different question entirely.

Vincent v. *Ann Arbor R. Co.*, 73 F. Supp. 729, cited under Point IV, was a libel in admiralty for maintenance and cure (without jury) brought by a Great Lakes seaman in the Southern District of New York. The question was of venue and the court said the Jones Act venue did not govern.

Sperbeck v. *A. L. Burbank & Co.*, 88 F. Supp. 623, stated with some measure of doubt that a cause of action for maintenance survives the seaman's death. The opinion discusses the nature of maintenance and cure and reaches no conclusion as to whether it is contractual, delictual or "something else." (p. 625-626)

Burkholder v. *United States,* 60 F. Supp. 700 simply states the well known rule that there are alternative remedies under the Jones Act or for unseaworthiness, which the seaman must elect, but that aside from either of these remedies the seaman can sue the United States for maintenance and cure under the Suits in Admiralty Act in admiralty without jury trial.

McDonald v. *Cape Cod Trawling Corp.,* 71 F. Supp. 888 holds that where diversity of citizenship is absent, a Jones Act case and a claim for damages against a shipbuilder for alleged negligent manufacture of a chattel cannot be joined in one suit at law with jury trial. Maintenance and cure was not involved although discussed for purposes of comparison wherein the Court points out that if such suits are filed in admiralty the trial is without jury.

Statutory Provision for a Jury Trial in Admiralty Applicable to Certain Limited Situations on the Great Lakes Does not Apply to the Case at Bar.

It is contended in Petitioner's brief that the Act of February 20, 1845, 5 Stat. at L. 726 (1845), gives libelant the right to a jury trial. This statute was passed during the epoch when it was believed that admiralty jurisdiction was co-extensive with the ebb and flow of the tide and that the constitutional grant of admiralty jurisdiction to the Federal Courts would not extend these benefits to the Great Lakes. It was then deemed advisable to provide for a jury trial in admiralty in the particular instances stated in the Act. The Court later held that the act had no effect as a grant of admiralty jurisdiction, as it was found that such jurisdiction extended beyond tidewater by virtue of the Constitution and the Act of 1789 (1 Stat. 73). *The Genesee Chief,* 12 How. 443 (1851).

However, subsequent codifications have retained that part of the act relating to a jury trial in the limited situations as originally enacted. Except to the extent provided in this statute trials in admiralty are before the court without a jury. Because the statute is a limitation upon the admiralty courts it must be strictly applied. The courts have universally ruled that all of the elements mentioned in the statute must be present in order that a jury trial may be had in an admiralty case if either party objects.

Thus in the case of *The Frank J. Fobert,* 32 F. Supp. 214 (W.D. N.Y. 1940) the jury demand was stricken because at the time of the accident the vessel was not on a voyage "between different states and territories upon the lakes and navigable waters connecting the lakes." It was on a voyage between New Haven, Connecticut via the Hudson River, New York State Barge Canal and through Lakes Ontario and Erie and the Niagara River their connecting link. Because the voyage started at a point outside the lakes and the navigable waters "connecting" the lakes, the statute was inapplicable. In the case at bar the vessel was not on a voyage, it was laid up for the winter. Further it was in the Indiana Harbor Canal which is navigable but is not "a navigable water connecting the lakes."

The limited application of the jury trial statute is further illustrated by the case of *Gillet* v. *Pierce,* 10 Fed. Cas. 388, No. 5437 (E.D. Mich. 1875) where a jury trial was denied because the pleadings did not show that the vessel was enrolled and licensed, although it was on a voyage between Lake Huron and Buffalo on Lake Erie. Referring to this law District Judge Longyear said, p. 389:

> "It is respectfully suggested, however, that, without further legislation, it is a mere excrescence upon the jurisdiction of the admiralty courts, partial in

> its provisions, impracticable of application in many of the cases sought to be provided for by it, and in some respects impossible of execution so as to do complete justice, for want of the necessary machinery to carry it out to its proper and legitimate results. It is partial, because it includes only a portion of the causes cognizable in the admiralty, and as to those it is limited to such only as arise in a restricted locality."

Petitioner's brief, page 15, cites *Strusa* v. *Minnesota Atlantic Transit Co.*, 13 Fed. Supp. 872 (W.D. N.Y. 1936). That was a Jones Act case filed in admiralty. The court denied a jury trial because it was not shown that at the time of the accident the vessel was employed in the business of commerce between different states. The court said, page 873, "On proof of such facts only would the defendant be entitled to a jury trial." Further, that was not a case of maintenance and cure.

In *The Erie Belle*, 20 F. 63 (E.D. Mich. 1883), a case of damage to a vessel arising out of towing, a jury trial was granted as the statutory specifications were met, but the court said, p. 64:

> "I doubt, however, whether the statute would apply at all to cases of pure salvage, as they are neither matters of contract nor tort, or to cases wherein both vessels are foreign, or engaged in foreign trade, or in trade between ports in the same state."

Petitioner's brief, page 14, refers to *The Western States*, 159 F. 354 (2 Cir. 1908) as the leading case on the subject. That was a libel filed by a passenger who had been robbed and beaten by a member of the crew while the vessel was on an interstate voyage. A jury trial was had but a verdict for $15,000 was reduced by the trial judge to $5,000 because he thought the verdict was the result of passion and prejudice, and decree was entered for the

latter sum. The decree was affirmed with the comment that the proceeding on appeal is in the nature of a new trial (p. 360).

None of the cases cited in Petitioner's brief hold that a seaman is entitled to a jury trial for maintenance and cure in the admiralty court over objection of a respondent. Maintenance and cure is neither a matter of contract or of tort but is a matter of status, a right unknown to the common law but provided to seamen as wards of the admiralty court under the general maritime law. Accordingly, for this further reason, the jury trial statute is inapplicable to libels for maintenance and cure.

The only case cited by Petitioner on the jury question which pertained to the injury of a seaman is *Sellon* v. *Great Lakes Transit Corporation,* 87 F. 2d 708 (2 Cir. 1937). That was a suit for injuries resulting from unseaworthiness combined with a count for maintenance and cure. There was a verdict on both counts for the libelant. Only the verdict for damages was appealed and the opinion does not touch in any way upon whether there had been any objection to a jury trial by respondent nor as to the applicability of the jury trial statute to a libel for maintenance and cure.

The Petitioner argues that maintenance and cure if not a contract must be a tort, that it has to be one or the other. If Congress had intended to grant a jury trial in admiralty as to all causes of every nature it would not have limited the statute to "any matter of contract or tort arising upon or concerning any vessel of twenty tons or upward * * *." Although the courts have referred to maintenance and cure as a right annexed by law to the employment, the true nature of the right is indicated in *Dryden* v. *Ocean Accident & Guarantee Corp.,* 138 F. 2d 291, 293:

> "Concededly an employee-employer relationship is a contractual one. Probably many of the details of that relationship—wages, hours, etc., are fixed by specific contract provisions and are express contractual rights. But the right here sought to be enforced by the seaman was not founded on a "meeting of the minds"—it was inexorably attached by ancient and established maritime *law* to every seaman's contract of employment. The parties had no choice in the matter. It was a duty superimposed by *law* coincidental with the formation of the contractual relation. The seaman could not contract against it—his or his employer's will is powerless to destroy it. This aspect alone reflects the true nature of the right here sought to be enforced. It is a right which the maritime law, in the wisdom of experience, found necessary and just, for the complete protection of seamen, whom maritime law has treated as "wards of admiralty."

As Justice Cardozo said in *Cortes* v. *Baltimore Insular Line,* 287 U.S. 367, it is a duty annexed by law to the relationship "and annexed as an inseparable incident without heed to any expression of the will of the contracting parties." (p. 372)

The statute in the case at bar is in derogation of the admiralty law and must be strictly construed. The decisions which have interpreted the statute such as *Gillet* v. *Pierce,* 10 Fed. Cas. 388, No. 5437 (E.D. Mich. 1875) were briefed and argued before the Court of Appeals. This Great Lakes jury trial statute has been on the books more than a century. Evidently during that time litigants have well understood that causes of maintenance and cure in admiralty are to be decided by the admiralty court without a jury, otherwise there would have been decisions on the point. There are hundreds of cases in which the admiralty courts have heard and decided matters of maintenance and cure arising on the Great Lakes

without a jury, but a jury demand has not been invoked in any contested case that we know of. The case at bar is the only decision squarely on the point, but there are a host of cases involving maintenance and cure which show as a matter of general principle that the Court of Appeals decided the case at bar correctly.

The short and summary answer to the Petition is that the decision of the Court of Appeals below is not in conflict with any decision of this Court or of any other court, that the question presented is not one of general public importance, and that the two lower courts decided this case correctly.

Wherefore it is respectfully requested that the Petition for Writ of Certiorari be denied.

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